NG KIAN CHONG & 2 ORS

v.

SAW SENG KEE

HIGH COURT MALAYA, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J.
[CIVIL APPEALS NO. 12-12-93(T) AND 12-13-93(T)]
1 SEPTEMBER 1994

PRACTICE & PROCEDURE - Striking out statement of claim at opening of trial - O. 14 r. 21(1) of the Subordinate Courts Rules 1980 - Application by Defendants to strike out Statement of Claim dismissed by the Sessions Court - Appeal by Defendants to High Court - Whether claim disclosed reasonable cause of action - Whether claim was frivolous and vexatious and/or an abuse of process of Court - Discretion of Court to strike out at commencement of trial - Delay - Parties to the action - Relationship between the appellants and respondent - Whether wrong parties cited by the Plaintiff.

STOCK EXCHANGE - Role of Stockbroker - Responsibility for issuance of shares of company - Remedies against improper issue of shares - Whether Stockbrokers and Remisers have legal standing in law - Obligation of purchaser of shares - Section 63 Companies Act 1965.

This was an appeal against the decision of the Sessions Court, Taiping which disallowed the appellants application to strike out the statement of claim filed by the respondent against the appellants. The application was made under O. 14 r. 21(1) of the Subordinate Courts Rules 1980.

Held:

[1] The burden upon an applicant who asks that a writ of summons and the statement of claim be struck out is a heavy one. It is indeed onerous. The applicant must be able to show that the action must fail or that for some other reason it is an abuse of the process of Court or that it is frivolous or vexatious.

[2] The appellants have succeeded in discharging the burden of showing that the wrong parties were cited by the respondent, that there was no contract between the appellant and the respondent and finally, that the cause of action was "obviously bad", almost incontestably bad.

[Defendant's appeal allowed with costs].

Cases referred to:

Halliday v. Shoesmith and Another [1993] 1 WLR 1 ***(refd)***
Attorney-General of Duchy of Lancaster v. L & N.W. Railway [1892] 3 Ch. 274 ***(refd)***
Wright v. Prescot U.D.C. [1916] 115 L.T. 772 ***(refd)***
Electrical Co. v. Attorney-General for Ontario [1919] A.C. 687 ***(refd)***
Tucker v. Collinson [1886]34 W.R. 354 ***(refd)***
Cross v. Earl Howe [1873] 62 L.J Ch. 342 ***(refd)***
Fletcher v. Bethom [1893] 68 L.T. 438 ***(refd)***
Krishnamurthy & Anor v. Malayan Finance Corp. Bhd. [1986] 2 MLJ 134 / [1986] 1 CLJ 541 ***(refd)***
Wenlock v. Moloney [1965] 2 ALL E.R 871 ***(refd)***
Huo Heng Oil (EM) Sdn. Bhd. v. Tang Tiew Yong [1987] 1 MLJ 139 ***(refd)***

Drummond-Jackson v. British Medical Association [1970] 1 ALL E.R. 1094 C.A. ***(refd)***
South Hetton Coal Co. v. Haswell [1898] 1 Ch. 465 ***(refd)***
Humphreys v. Polak [1901] 2 K.B. 385 ***(refd)***
Shaw v. Shaw [1965] 1 W.L.R. 537 ***(refd)***
Wing v. Burn [1928] 14 T.LR 258 ***(refd)***
Johnston v. Johnston [1884] 33 W.R 239, C.A. ***(refd)***
Dyson v. A.G. [1911] 1 K.B. 410 ***(refd)***
Young v. Holloway [1895] P 87 ***(refd)***
Castro v. Murray [1875] 10 Ex. 213 ***(refd)***
House of Spring Gardens Ltd. v. Waite [1990] 3 W.L.R. 347 ***(refd)***
Steamship Mutual Association Ltd. v. Trollope and Colls (City) Ltd. [1986] 33 Build. L.R. 77 C.A. ***(refd)***
Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] A.C. 821 ***(refd)***
Foss v. Harbottle [1873] L.R. 8 Ch. App. 1035 ***(refd)***
Residues Treatment and Trading Co. Ltd. & Ors [1988] 6 A CLC 1,160 ***(refd)***
Syarikat Soon Theam Sdn. v. H'ng Chye Jin [1975] 1 MLJ 259 ***(refd)***

Legislation referred to:
Companies Act, 1965, (Act 125) s. 63
Rules of the High Court 1980, O. 14
Rules of the Supreme Court, O. 18 r. 19 (UK)
Subordinate Courts Rules 1980, O. 14 r. 12(1)

Other sources referred to:
Supreme Court Practice 1993, vol. 1, part 1 at p. 332

For the 1st & 2nd appellants in Civil Appeal No : 12-13-93(T) - A. Selvanathan; M/s. Kean Chye & Sivalingam
For the 3rd appellant in Civil Appeal No : 12-12-93(T) - Malathi Jegadesan; M/s. Rashid & Lee
For the respondent in both appeals - V.K. Dasaradhrad; M/s. Karpal Singh & Co.

JUDGMENT

Haji Abdul Malik bin Haji Ishak J:

These appeals arose from applications made by the first and second appellants/defendants dated 4 December 1991 and by the third appellants/defendant dated 22 October 1992 under O. 14, r. 21(1) of the Subordinate Courts Rules, 1980 ("SCR") to strike out the statements of claim in the summonses on the usual grounds that they did not disclose a reasonable cause of action; were frivolous and vexatious and were otherwise an abuse of the process of the Court. These were appeals from the decision of the Sessions Court, Taiping, Perak ("trial Court") when the trial Court decided not to strike out the various statements of claim.

The facts are as follows. The respondent/plaintiff, an investor in the Stock Exchange market, entered into several oral agreements with the first and second appellants/defendants who were remisers of the third appellant/defendant's stock broking company wherein the first and second appellants/defendants agreed to sell and the respondent/plaintiff agreed to buy certain lots of Pahang Investments Public Limited Company ("PI") shares totalling a grand total of RM95,127.15 sen. The respondent/plaintiff received in return not PI shares but shares from the Pahang Consolidated Company Limited ("PC"). This prompted the respondent/plaintiff to file summonses against the three appellants/defendants and it was

alleged, *inter alia*, that it was an implied condition of the oral agreements that the appellants/defendants would sell proper and valid PI shares; that the PI shares sold by the appellants/defendants to the respondent/plaintiff were at all material times invalid and issued unlawfully; that the appellants/defendants warranted and represented to the respondent/plaintiff that the PI shares were valid shares and, last but by no means least, there were allegations of negligence and fraud perpetrated by the appellants/defendants. In the statement of defence, it was alleged, *inter alia*, that there was nothing improper in respect of the transactions between the parties as the respondent/plaintiff had got what he had contracted for; that at all material times the PI shares were good for delivery; that the appellants/defendants did not induce the respondent/plaintiff to enter into the oral agreements by warranting and representing that the PI shares were valid as the respondent/plaintiff had entered into the oral agreements at his own behest; that in the alternative, the first and second appellants/defendants averred that they merely acted as intermediaries in the sale and purchase of the PI shares and that it was the duty of PI to ensure that the PI shares were valid, legal and good for listing or trading in the Stock Exchange and, last but by no means least, it was averred that the appellants/defendants did not induce the respondent/plaintiff to purchase the PI shares by misrepresentation.

In his affidavit affirmed on 29 November 1991 in support of the O. 14 application, the first appellant/defendant on behalf of himself and that of the second appellant/defendant averred that as remisers, they acted as middlemen and were not authorised to confirm the authenticity of the PI shares and that they believed that the Registrar of PI was responsible to confirm the authenticity of the PI shares. The third defendant, on the other hand, affirmed an affidavit through Muhammad Nadzri Hamzah dated 15 October 1992 in support of the O. 14 application and averred that as a Stock Broking Company, they were not responsible to confirm the authenticity of the PI shares. It was further averred that the Kuala Lumpur Stock Exchange ("KLSE") had since set up a company known as Securities Clearing Automated Network System Sdn. Bhd. ("SCANS") and all transactions for the sale and purchase of shares conducted by KLSE must be through SCANS. Next, it was also averred that PI had been suspended from operating its shares on 14 October 1985 and withdrawn from the KLSE's list on 29 February 1988.

It is proposed, before proceeding to consider the merits of the appellants/defendants' application for striking out, to consider a potent point raised by the learned Counsel for the respondent/plaintiff. That point was in regard to the issue of delay. It is not disputed that the pleadings filed therein had a chequered history. It started with a statement of Claim dated 13 November 1989. This was followed by the joint statement of defence by the first and second appellants/defendants dated 14 February 1990. Soon thereafter, the statement of claim was amended on 29 May 1990, which was once again re-amended on 19 September 1990. The third appellants/defendants finally filed their statements of defence 9 November 1990. On 7 October 1991, the first and second appellants/defendants filed an amended joint statement of defence. The third appellant/defendant also filed an amended statement of defence on 7 September 1992. Finally, the respondent/plaintiff filed once again his re-amended statement of claim on 10 October 1992. The joint applications by the first and second appellants/defendants for striking out bore the

date 4 December 1991 whereas the application for striking out by the third appellant/defendant was dated 22 October 1992. It was argued strenously that these applications for striking out should not be entertained and the trial Court rightly dismissed these applications forthwith.

In *Halliday v. Shoesmith and Another* [1993] 1 WLR 1, the Court of Appeal considered the question of whether to grant an application to strike out pleadings at opening of trial. The facts there were that by a writ issued in 1988, the plaintiff sought an order for probate of a will drawn up in 1986, shortly after the testatrix's death, which named him as the residuary beneficiary of her estate. The defendant, the testarix's nephew, by a defence and counterclaim contested that will on the grounds of lack of testamentary capacity and/or undue influence and sought an order for probate of an earlier will drawn up in 1984, which named him as sole beneficiary. At the outset of the hearing of the action, Counsel for the plaintiff applied to strike out certain of the allegations in the defence and counterclaim on the grounds that they disclosed no reasonable cause of action or were vexatious and frivolous within the meanings of R.S.C, O. 18, r. 19. The Judge considered documentary evidence including medical reports and ordered much of the defence and counterclaim to be struck out. He held in the result that the plaintiff succeeded in upholding the 1986 will. On appeal by the defendant, it was held, (allowing the appeal), that an application to strike out a pleading should be made at the earliest opportunity, and should not be entertained at the commencement of the trial after the costs of preparation had been incurred save in a most exceptional case and on receipt of a valid explanation for the lateness of the application; that in the circumstances the Judge could not properly have exercised his descretion by ordering the defendant's pleadings to be struck out at so late a stage.

According to the Supreme Court Practice 1993, volume 1, part 1 at page 332:

> Although the rule expressly states that the order may be made 'at any stage of the proceedings,' still the application should always be made promptly, and as a rule before the close of pleadings. Where the statement of claim is being attacked, the application may be made before the defence is served (*Attorney-General of Duchy of Lancaster v. L & N.W. Railway* [1892] 3 Ch. 274); but where it is sought to stay or dismiss the action, the application should not be made before the service of the statement of claim (*Wright v. Prescot U.D.C.* [1916] 115 L.T. 722; cf. *Electrical Co. v. Attorney-General for Ontario* [1919] A.C. 687).

In another part of the same page, it is stated that:

> The application may be made even after the pleadings are closed (per Brett M.R. *in Tucker v. Collinson* [1886] 34 W.R. 354, but was refused after the action had been set down for trial (*Cross v. Earl Howe* [1873] 62 L.J. Ch. 342; *Fletcher v. Bethom* [1893] 68 L.T. 438).

Salleh Abas L.P. (as he then was) in *Krishnamurthy & Anor v. Malayan Finance Corp. Bhd.* [1986] 2 MLJ 134, crystallised the law as to when an application for an O. 14 judgment could be made, in the following words:

> The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, ,the plaintiff must explain the delay. If this explanation was not accepted by the Court no Order 14 judgment could be signed. This is the *ratio decidendi* in *McLardy v. Slateum* [1980] 24 QBD 504. This case was followed by Raja Azlan Shah J. (as he then was) in *Comptroller-General of Inland Revenue Malaysia v.*

Weng Lok Mining Co. Ltd [1969] 2 MLJ 98 and Abdoolcader J. (as he then was) in *Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267.

It is plain from these cases that striking out is entirely at the discretion of the trial Court and I may add that what the appellate Court should be concerned with is the exercise of that discretion by the trial Court. On discretion, the salutary remarks by Danckwerts L.J. in *Wenlock v. Moloney* [1965] 2 ALL E.R 871 should be referred to. There, Danckwerts L.J. said at page 874:-

> The position is very clearly expressed by Lord Herschell in *Lawrence v. Lord Norreys* [1886-90] ALL E.R 858, at page 863. He said:
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> > It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved. ... The position under two former rules has been incorporated in the present RSC, O. 18 r. 19 of the new rules. There is no doubt that the inherent power of the Court remains, but this summary jurisdiction of the Court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial Judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the Court and not a proper exercise of that power.

Applying the above principles to these appeals before me, the appellants/defendants sought to explain the delay. It was submitted that the third appellant/defendant was suspended and records have not been available for evidence gathering in order to support the applications for striking out. The appellants/defendants had to proceed rather slowly in their evidence gathering exercise, more by way of piece meal method. The matter was further compounded, so submitted the appellants/defendants, by the liquidation of PI. In my judgment, these explanations for the delay could be accepted as reasonable even though such explanations were made before me by way of an oral submission. Chong Siew Fai J. (as he then was, now a Federal Court Judge) accepted an oral explanation of Counsel in the case of *Huo Heng Oil (EM) Sdn. Bhd. v. Tang Tiew Yong* [1987] 1 MLJ 139. Moreover, the actions in these appeals have not been set down for trial and thus the delay in applying for striking out should not be a barrier for the appellants/defendants. I will now proceed to set out the grounds relied upon by the appellants/defendants to strike out the statements of claim.

No reasonable cause of action.

It is said that a reasonable cause of action would mean a cause of action with some chance of success when only the allegations in the pleadings are being considered (*Drummond-Jackson v. British Medical Association* [1970] 1 ALL E.R. 1094 C.A.). The mere fact that the cause of action is weak, and not likely to succeed, is no ground for striking it out (*Wenlock v. Moloney* (*supra*)). There are several instances where the statement of claim will be struck out, and the action dismissed. Thus, in an action of contract if it appears that there is no contract between the parties; or no contract valid in law; or a totally illegal contract; or the cause of action brought solely to obtain relief from the Court which has no

power to grant it; and, last but by no means least, where relief is sought on a ground in which no such relief could be obtained (see *South Hetton Coal Co. v. Haswell* [1898] 1 Ch. 465; *Humphreys v. Polak* (19010 2 K.B. 385; *Shaw v. Shaw* [1965] 1 W.L.R. 537; *Wing v. Burn* [1928] 14 T.L.R 258 and *Johnston v. Johnston* [1884] 33 W.R. 239, C.A.).

Frivolous and vexatious

These words relate to cases which are obviously unsustainable as would amount to an abuse of the Court. The Courts must in their judicial discretion determine whether the proceedings are frivolous and vexatious (see *Attorney-General of Duchy of Lancaster v. L & N.W. Ry* [1892] 3 Ch. 274). It is now trite law that the Court will not permit a plaintiff to be ousted from the judgment seat, so to speak, except where the cause of action is obviously bad and "almost incontestably bad" (*Dyson v. A.G.* [1911] 1 K.B. 410). The pleading must, in all the circumstances, be so obviously frivolous that to advance it forward must be an abuse of the process of the Court (*Young v. Holloway* [1895] P 87).

Abuse of the process of the Court

It is said that the process of the Court must be used *bona fide* and properly and must not be abused. The Court will always guard its machinery from being used as a means of vexation and oppression in the process of litigation (*Castro v. Murray* [1875] 10 Ex. 213).

The classifications of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed. Much will depend on all the relevant circumstances and, towards this end, the considerations of public policy and the interests of justice may be relevant and material. Thus, it is an abuse of the process of the Court for a party to re-litigate the issue of fraud after it has been tried and decided by an Irish Court (*House of Spring Gardens Ltd. v. Waite* [1990] 3 W.L.R. 347). It is also an abuse of the process of the Court and will be struck out if the claim is groundless and unfounded in the sense that the plaintiff does not know any of the facts to support it (*Steamship Mutual Association Ltd. v. Trollope and Colls (City) Ltd.* [1986] 33 Build. L.R. 77 C.A.).

I must at once say that the burden upon an applicant who asks that a writ of summons and the statement of claim be struck out is a heavy one. It is indeed onerous. He must be able to show that the action must fail or that for some other reason it is an abuse of the process of the Court or is frivolous of vexatious.

Applying the aforesaid principles to the facts of these appeals, the thrust and substance of the appellants/defendants' argument was that the wrong parties were cited in the summonses. The right party, it was argued, should be PI. The question to pose would be this: Who is responsible for the issuance of the shares of a Company, in particular the PI shares? It is right to say that the Registrar of PI, on mandate given by the Board of Directors, will issue the shares. If these shares were invalid as alleged by the respondent/plaintiff, then the right party to be sued would be PI and not the appellants/defendants for the simple reason that the latter has no part to play in the issuance of the shares. In *Howard Smith Ltd. v. Ampol Petroleum Ltd* [1974] A.C. 821, it was argued that the only legitimate purpose of the power to issue shares is to raise capital but this argument was rejected by the Privy Council as being too narrow. Their Lordships of the Privy Council refused

to define in advance the exact limits beyond which directors must not go, "since the variety of situations facing directors of different types of company in different situations cannot be anticipated" but went on to hold that "it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purposes of destroying an existing majority, or creating a new majority which did not previously exist". Though the directors have the power to issue, it must be exercised legitimately and for legitimate purposes.

Now, adverting to the remedies against improper issue of shares, it is not incorrect to say that where the directors have exercised their power to issue shares for improper purposes, it is usually a shareholder or group of shareholders who seeks to have the issue overturned by the Court. This can be achieved by an application for rectification of the register or for a declaration that the issue is void as a breach of the directors' duty to the company. However, the latter course of action may run foul of the rule in *Foss v. Harbottle* [1873] L.R. 8 Ch. App. 1035. That rule may be summarised as follows: "Where a duty is owed to a company and complaint is made of breach of that duty, the company itself is the only proper plaintiff. "There are exceptions to this rule. Thus, in *Residues Treatment and Trading Co. Ltd. & Ors.* [1988] 6 A CLC 1,160, the full bench of the Supreme Court of South Australia ruled that Courts should "recognise the standing of individual shareholders to have allotments made for improper purposes set aside." Back home in Malaysia, s. 63 of the Companies Act, 1965 (Act 125) provides that a holder of a share which is not valid may apply to the Court for validation of the share. Thus, the respondent/plaintiff here is not barred from resorting to the Court to validate the shares purchased by him. Why didn't the respondent/plaintiff seek the aid of the Court to validate the shares which he alleged to be invalid? The answer is quite obvious. To date, there is no official verification to show that these shares are invalid. The Chairman of KLSE in a press release dated 11 April 1988 stated in no uncertain terms that:

> The public is hereby advised that to date, there is no official statement from any of the authorities of the registrar of PIPLC (Pahang Investments Public Limited Company) that there are shares in PIPLC which are found to be forged shares.

Incidentally, the allegation that the respondent/plaintiff was handed the wrong share certificates was nothing but a mere storm in the teacup. There is evidence that both PI and PC relate to one entity. That PI was changed to PC in name was made on 10 February 1982 (see exhibit "NKC1" at page 124 of the appeal bundle in C.A. 12-13 of 1993 (T)).

Reverting back to s. 63 of the Companies Act, 1965 (Act 125), the legislature saw it fit to allow the company that issued or alloted those shares or a holder or mortgagee of any of those shares or a creditor of that company to apply to the Court to validate those shares that were improperly issued. Stockbrokers and their servants or agents (remisers) were deliberately left out by the legislature for the simple reason that these people have no legal standing in law. They are mere middlemen, a conduit pipe between the buyer and the seller. I am fortified in my view by the passage that appeared in *Syarikat Soon Theam Sdn. v. H'ng Chye Jin* [1975] 1 MLJ 259 where Chang Min Tat J (as he then was) said (at page 260):-

> A sharebroker is by his designation not a contracting party but is an agent who arranges for the "marriage" of an offer to buy with an offer to sell. For this brokerage he gets a commission. *Taylor v. Stray* [1857] 2 C.B.N.S 175; 140 E.R. 380) and *Seymour v. Bridge* [1885] 14 Q.B.D. 460 are, I consider, sufficient authorities for the proposition that once a broker had received an order from his client, his authority to complete it and so rid himself of the personal liability undertaken by him within the rules of the stock exchange cannot be revoked. The authority could of course always be revoked at any time before it had been acted upon: see *Fletcher v. Marshall* [1846] 15 M. &W. 755, 153 E.R. 1055.

On the same page, further down the paragraph, his Lordship continued:

> In so far as mitigation is concerned, on the authority of *Thacker v. Hardy* [1878] 4 Q.B.D. 685 CA, the broker who had bought securities for his client is under no obligation to re-sell them.

The allegations of misrepresentation, fraud and negligence allegedly perpetrated by the appellants/defendants must be read in the context of the contractual nexus between the appellants/defendants and the respondent/plaintiff. In the absence of the contractual nexus between parties, these allegations fall flat to the ground. These allegations can be said to be ill-founded and totally misconceived.

For the above reasons, the appellants/defendants have succeeded in discharging the burden of showing to this Court that the wrong parties were cited by the respondent/plaintiff; that there was no contract between the appellants/defendants and the respondent/plaintiff and, finally, that the cause of action was "obviously bad" and "almost incontestably bad". In the circumstances, the appellants/defendants succeeded in these appeals. I ordered that:

(1) in Civil Appeal number 12-12-93 (T), the appeal was allowed with costs; and

(2) in Civil Appeal number 12-13-93 (T), the appeal was also allowed with costs.

The respondent/plaintiff is not without remedy. He can go after PC in a Court of law.